

# **PFAS LITIGATION UPDATE: THE RISKS OF CONSUMER PRODUCT MARKETING CLAIMS**

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## **SUMMARY**

As general awareness of per- and polyfluoroalkyl substances (“PFAS”) has continued to rise in recent years, courts have experienced an increase in civil lawsuits alleging false and misleading advertising in corporate marketing statements for consumer products. Most of the lawsuits filed in 2021 and 2022 focused primarily on four categories of products:

1. Food and Food Packaging;
2. Cosmetics;
3. Clothing and Textiles; and
4. Personal Care Products.

The question that many businesses are facing is what claims can create a risk of litigation if PFAS may be present in their products. To answer that question we examined the applicable lawsuits and compiled a summary of the marketing statements and advertisements identified by plaintiffs as allegedly false or misleading. We then compared these marketing statements across all industries, as well as within the four specific industries listed above, to identify emerging trends that were frequently cited in litigation.

While not an exhaustive list, these summaries will help businesses prioritize which statements should be addressed as soon as possible to mitigate their litigation risk if they believe that PFAS may be present in their products.

For additional information, please refer to our state-by-state guides for [PFAS in consumer products](#) and [PFAS in food packaging](#).

## **LITIGATION OVERVIEW**

There are three general types of false or misleading marketing statements regarding PFAS or PFAS-containing products that are frequent targets of litigation across all consumer product categories.

1. **Safe.** Plaintiffs most often challenged marketing statements involving the safety of a product that is alleged to contain PFAS, in large part because plaintiffs contend PFAS is not a “safe” ingredient in these consumer products. By way of example, the statements identified by plaintiffs include representations that a product is generally “safe,” that it is specifically “safe for human consumption,” and/or that it was produced in accordance with certain “food safety standards.”
2. **Sustainable.** Plaintiffs opposed assertions relating to environmentally conscious decision-making, particularly statements regarding sustainability or minimizing environmental impact. PFAS - sometimes described as “forever-chemicals -” do not break down in the environment and are the subject of increasing regulatory scrutiny, so Plaintiffs have argued that they cannot be considered environmentally conscious or sustainable.
3. **100% Natural.** Plaintiffs routinely cited claims that products were “all natural” or used “only real ingredients” in products on the basis that all PFAS are man-made compounds, and cannot be described as “natural.”

Additionally, some plaintiffs also based their claims on statements claiming that PFAS-containing products were “clean,” “non-toxic,” “simple,” “high-quality,” and the product did not contain PFAS, but testing later revealed otherwise.

## FOOD AND FOOD PACKAGING

Food and food packaging products have been some of the primary targets for PFAS litigation regarding false and misleading statements. The three most common marketing statements resulting in PFAS litigation for food and food packaging products are:

1. **Food Safety.** The most common allegation in the food product category is that a food product cannot be described as “safe” if that product contains PFAS either in the food itself or in the packaging. So far plaintiffs have brought these claims based on the alleged presence of PFAS in various types of food packaging, claiming that the PFAS migrates to the food product itself.
2. **Responsible Sourcing of Ingredients.** The second most common allegation is that the presence of PFAS in a food product makes claims about “responsible sourcing” of ingredients for those products misleading. Although not as common as claim based on the safety of the products, sourcing claims – which sometimes are found on company websites and in corporate disclosures, not just on food packaging – are still a risk for food products.
3. **Natural Ingredients.** As discussed above, plaintiffs are arguing that a product cannot be described as “natural” if it includes any man-made compounds like PFAS. Besides asserting that the product is natural, plaintiffs have also cited claims like “simple” and “minimal.”

Please refer to our guide to [state-by-state regulations of PFAS in food packaging](#).

## COSMETICS

Litigation regarding false advertising and marketing for cosmetic products relating to PFAS has also increased in the past two years. This coincides with the rise of campaigns describing makeup as “clean” or otherwise environmentally conscious.

1. **Safety.** Plaintiffs most frequently target cosmetic companies for alleging their product is “safe,” or putting an emphasis on “safety” somewhere within a marketing campaign. For example, plaintiffs have identified statements that a company follows certain “safety standards,” is committed to delivering “safe” products, and/or that its products are produced using “safe formulas.”
2. **Sustainability.** Statements regarding sustainability or responsible sourcing are equally prominent. In cosmetics cases plaintiffs have also highlighted the omission of PFAS in products which they allege actually have trace amounts of PFAS.
3. **Natural.** Once again advertising statements claiming a product is “natural,” “clean,” “non-toxic,” or “toxic free” are the third most common statements cited in cosmetics litigation regarding PFAS.

## CLOTHING AND FABRICS

The most litigated marketing statements related to clothing and textile products include:

1. **Sustainable.** Statements regarding the sustainability of the product or the general sustainability of the company.
2. **No PFAS.** Affirmative statements regarding the lack of PFAS in a product, particularly a claim that the product is “PFAS-free,” although PFAS were later found to be in the products, even in small amounts.
3. **Safe.** Statements that the products were “safe” was the third most common marketing statement targeted in litigation. For example, plaintiffs have identified statements that products are designed to be “safe,” that a company is committed to providing a “safe” product, and/or that a company puts its customers’ “safety first.”

Notably, plaintiffs did not cite misleading marketing statements regarding the safety of the product as frequently as in other areas. This trend is likely due to clothing and textiles representing the only product category discussed in this analysis that is not consumed (e.g., food products) or otherwise directly applied on the human skin and body such as water-proof mascara (e.g., cosmetics) or dental floss (e.g., personal care products).

## PERSONAL CARE PRODUCTS

Personal care products, such as toothpaste or shampoo, have been less litigated based on false or misleading advertising in comparison to the presence of PFAS in other product classes.

However, trends have emerged in the types of marketing statements subjecting these products to litigation. Those statements follow the same trends seen in food and food packaging products where “safe,” “responsible sourcing,” and “natural” are the three most common marketing statements that are alleged as being misleading or false.

## **CONCLUSION**

Recent PFAS litigation suggests that lawsuits alleging false and misleading marketing statements are on the rise in consumer products that may contain PFAS. To mitigate that risk, companies need to understand: (1) whether their products contain PFAS; and (2) whether their marketing claims are inconsistent with the potential presence of the chemicals. Claims related to safety, sourcing, and ingredient purity appear to be the primary targets. Whether some or all of these claims will ultimately be successful is still an open question for the courts to decide, but in the meantime, companies can take proactive steps to address their potential litigation risk.

For more information on PFAS compounds and related matters, please visit our [PFAS webpage](#). If you have a question about any litigation trends or cases, contact Tom Lee, Christian Bromley, Emma Cormier, John Kindschuh, or any other member of our PFAS team at Bryan Cave Leighton Paisner LLP.

## **RELATED PRACTICE AREAS**

- PFAS Team

## MEET THE TEAM



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